

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the record and consideration of the arguments of the parties, the Appeals Board finds, for the reasons stated below, that claimant sustained a thirty-seven and three-fourths percent (37.75%) permanent partial general disability as a result of accidental injury arising out of and in the course of his employment.

Claimant injured his low back as a result of repetitive lifting activities in the course of his employment with respondent. On March 14, 1991, his left leg went numb while he was loading ice cream. Claimant was treated primarily by Dr. Charles C. Craig, a board-certified orthopedic physician from Newton, Kansas. He diagnosed degenerative disc disease at several levels of the low back and prescribed physical therapy, work hardening, medication, three separate epidural injections, and back exercises. He also referred claimant to Dr. Stein for neurological examination and evaluation as a possible surgical candidate. Both Dr. Stein and Dr. Craig concluded that claimant was not a candidate for surgery.

Claimant describes the primary issue in this appeal as one related to whether the accommodated position offered by respondent should limit the percentage of disability awarded claimant. The evidence establishes the respondent attempted to afford claimant an accommodated position. He returned for a period of three (3) days but was unable to continue to perform the modified duties. The duties had been modified so that the weight claimant was required to lift was substantially lighter. The evidence also indicates, however, that the return to the accommodated position was on a purely trial basis. Dr. Craig, the treating physician, was persuaded to increase the weight-lifting restrictions to allow claimant to attempt this return to the accommodated position. Dr. Craig testified that he was not surprised claimant was not able to perform the reduced duties and that he did not think he would be able to do the work to begin with.

It is argued that Dr. Schlachter's opinion should be construed as indicating he believes claimant could perform the modified duties. Taken as a whole, the Appeals Board does not read Dr. Schlachter's opinions as approving the accommodated duties even though the weight restrictions would not have been violated. Based upon claimant's testimony and that of his treating physician, the Appeals Board concludes that claimant was, as a result of his previous on-the-job injury, unable to perform duties in the accommodated job.

As a result, the Appeals Board does not consider the attempted accommodation to reduce the appropriate award of disability. Had the accommodation been successful, respondent might then have had the advantage of the presumption against work disability. K.S.A. 44-510e. However, where, as here, that claimant is realistically unable to perform even the accommodated duties, the offer of accommodation does not reduce the work disability experienced by the claimant.

Work restrictions were recommended by Dr. Craig and by Dr. Schlachter. The restrictions recommended by Dr. Craig were that claimant should do no lifting over fifteen (15) pounds, avoid standing for more than thirty (30) minutes, avoid walking for more than forty-five to sixty (45-60) minutes, and avoid sitting for more than thirty (30) minutes. He recommended claimant also avoid repetitive bending and twisting activities. Dr. Schlachter's less-restrictive limitations indicated claimant should do no repetitive lifting over thirty (30) pounds and no single lifts over forty (40) pounds, with no repetitive bending, twisting or working in awkward positions. He also suggested claimant should have a job where he could sit part-time and stand part-time.

From the restrictions of Drs. Schlachter and Craig, Jerry Hardin and Karen Terrill provided opinions as to claimant's loss of access to the open labor market and reduced ability to earn a comparable wage. Jerry Hardin testified that from Dr. Schlachter's restrictions, claimant had a fifty-five to sixty percent (55-60%) loss of access in the open labor market and from Dr. Craig's the loss was seventy to seventy-five percent (70-75%). He concluded claimant's ability to earn a comparable wage had been reduced by thirty-two percent (32%) and projected a \$240.00 per week post-injury wage.

Karen Terrill testified the loss of access to the open labor market as twenty-two percent (22%) on the basis of Dr. Schlachter's restrictions and sixty-six percent (66%) from Dr. Craig's. She projected a reduced ability to earn a comparable wage of ten percent (10%).

The Administrative Law Judge has awarded a thirty percent (30%) disability, finding that the disability should be considered to be less than the averaging of the opinions of the vocational experts. The Appeals Board, however, feels the evidence does support, and it is appropriate in this case, to average the opinions of those vocational experts. The restrictions recommended by the physicians are quite severe and, in our opinion, do justify a thirty-seven and three-fourths percent (37.75%) work disability which is arrived at by giving equal weight to the opinions of the vocational experts based upon the two sets of restrictions by the physicians. As a result, the Appeals Board concludes claimant would have a fifty-four and one-half percent (54.5%) loss of access to the open labor market, and a twenty-one percent (21%) reduction in ability to earn a comparable wage. It also appears appropriate in this case to give weight equally to the two factors in the test as authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990), and the result supports the finding of thirty-seven and three-fourths percent (37.75%) permanent partial general disability the Appeals Board finds to be the disability sustained by the claimant.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated January 31, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Curt Becker, and against the respondent, Associated Milk Producers, and the insurance carrier, Kemper Insurance, a/k/a/ American Motorist Insurance, for an accidental injury on March 14, 1991, as follows:

The claimant is entitled to 57.82 weeks temporary total disability compensation at the rate of \$236.27 per week based on an average weekly wage of \$354.38 or \$13,661.13, followed by 357.18 weeks for 37.75% permanent partial general disability compensation at \$89.19 per week or \$31,856.88, for a total award of \$45,518.01.

As of October 7, 1994, there would be due and owing to the claimant 57.82 weeks temporary total disability compensation in the sum of \$13,661.13, plus 128.47 weeks permanent partial disability compensation at \$89.19 per week or \$11,458.24, for a total due and owing of \$25,119.37, which is ordered paid in one lump sum, less any amounts previously paid. Thereafter, the remaining balance of \$20,398.64 shall be paid at the rate of \$89.19 per week for 228.71 weeks until fully paid or until further order of the Director.

Further award is made that claimant is entitled to medical expenses, and any unauthorized medical expenses, if any.

Future medical will be considered upon proper application.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier and such are directed to pay costs of the transcripts as follows:

Underwood and Shane	
Preliminary Hearing Transcript dated March 5, 1992	\$96.50
Ireland Court Reporting	
Deposition of Lawrence Brennan dated October 16, 1992	\$108.10
Deposition of Glen Seaton dated October 16, 1992	\$163.90
Deposition of Jerry Hardin dated April 30, 1993	\$335.30
Deposition of Dr. Paul Stein dated July 14, 1993	\$106.13
Deposition of Karen Terrill dated July 28, 1993	\$233.85
Deposition of Dr. Ernest Schlachter dated November 2, 1993	\$162.54
Total	\$1109.82
Todd Reporting	
Deposition of Dr. Charles Craig dated May 25, 1993	Unknown
Owens, Brake & Associates	
Preliminary Hearing Transcript dated September 10, 1992	\$126.85
Preliminary Hearing Transcript dated September 1, 1993	\$209.80
Total	\$336.65

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, 1861 N. Rock Road, Suite 320, Wichita, KS 67206
Kendall Cunningham, 125 N. Market, Suite 1416, Wichita, KS 67202
George R. Robertson, Administrative Law Judge
George Gomez, Director